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ENSURING JUDICIAL INDEPENDENCE THROUGH CIVICS EDUCATION

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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

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ENSURING JUDICIAL INDEPENDENCE THROUGH CIVICS EDUCATION

WEDNESDAY, JULY 25, 2012

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:04 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Klobuchar, Coons, Blumenthal, Grassley, Sessions, and Lee.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Before we get started, I should say, one, of course, we are delighted that Justice O'Connor is here. Senator Grassley is on his way. He was doing a conference call with students. We were all trying to do education things. I am just wondering, all of you who are students in this room, would you please stand up just so the Justice can see?

[Applause.]

Chairman LEAHY. Not bad. In the past, we have had—I was telling Justice O'Connor earlier that Justice Breyer and Justice Scalia were here, and we have had so many schools around the country now have the DVD of that hearing. And even in the little State of Vermont, I have had people stop me, students stop me on the street who have seen the DVD, and it is a chance to learn, it is a learning experience, and we try to do that periodically here.

Of course, Justice O'Connor was appointed to the Supreme Court by President Reagan in 1981. She served on the Court until her retirement in 2006. I recall—and we talked about this in the back—when then-Senator Barry Goldwater from Arizona came to see me, as he did others, to praise Justice O'Connor and say that she would make a great Justice, and he was absolutely right. She has been a leading voice for the importance of civics education. She currently serves as Chair of the Board of Directors for iCivics, an organization which promotes civics education in our Nation's schools.

I hope, Justice, you were pleased to see the number of students who are here.

Justice O'CONNOR. I am indeed. Thank you. When I was a student a long time ago, I never had the privilege of coming to Washington, D.C., and sitting in on a Senate hearing. So I think it would be very instructive for young people to have a chance to do that.

Chairman LEAHY. Well, Justice, you are bringing a lot of students to Washington with this, and we are streaming it on our Judiciary website.

Justice O'CONNOR. Good.

Chairman LEAHY. And I think that discussions like this serve our democracy. As public officials, we owe it to all Americans to be transparent about what we do in our official capacities. We justify their trust by demonstrating how our Government works to uphold our common values, how we are guided by the Constitution, and how that Constitution has served over the years to make our great Nation more inclusive in our continuing effort to be a "more perfect union."

As I mentioned, with the students, just before Senator Grassley came in, I mentioned that Senator Grassley was doing his own outreach to students in a phone call before he came in here. And, Chuck, the number of students in here who stood to be recognized, that was quite a number.

We have three branches of Government under our Constitution, but only two of them are political, and intended to be political. The third branch, the Judiciary, is independent by design. Both of the political branches come together in the judicial confirmation process to equip that independent branch with the men and women necessary to carry out its role in our democracy.

I have had a chance to vote on every Justice for the last 37 years, starting with John Paul Stevens.

Justice O'CONNOR. Oh, my, yes.

Chairman LEAHY. Including, of course, Justice O'Connor.

Judicial independence and the role of judges in our democracy has been the subject of two previous hearings with Supreme Court Justices—Justice Kennedy, Justice Scalia, and Justice Breyer. But in the wake of recent rhetoric about the sitting Chief Justice, I think the public conversation today is all the more relevant. I am concerned about some of the rhetoric about the Chief Justice when he has been called everything from a "traitor" to having "betrayed" President George W. Bush. Well, I think these types of attacks reveal the misguided notion that Justices and judges owe some allegiance to the President who appointed them or to a political party.

I have served on this Committee for three decades—for more than that—and have questioned every Supreme Court Justice serving on the high Court today at their confirmation hearings. I have voted to confirm Justices and judges nominated by both Republican and Democratic Presidents, as I did in voting for Chief Justice Roberts. I have long noted that I do not vote to confirm individuals to the bench because I expect to agree with all of their decisions. I can find every Justice I have voted with, I can find decisions that I disagree with. I can find a lot of decisions I agree with. My only standard is will they be a fair and independent judge and fair and impartial.

I say this because nobody should demand political allegiance from any judge, whether nominated by a Democrat or by a Republican. As many sitting Justices have noted, it is completely appropriate to criticize the rulings of any court—and we have that right as Americans—including the Supreme Court. For example, in the Chief Justice's recent health care decision, much of which I dis-

agree, I find the opinion of Justice Ginsburg compelling on congressional authority under the Commerce Clause and Spending Clause. But it reveals a complete misunderstanding of our system to attack the Chief Justice saying that he has not followed a political party or showed allegiance.

So this is a teachable moment. Justice O'Connor has dedicated her life to public service. She has been elected to State government. She served on both the State bench and on the highest Court in the land. She is the last Justice not to come from what I call the judicial monastery. She has traveled the world to teach emerging democracies about the importance of the rule of law, and I know those have been teachable moments. She has directed her considerable talents to reminding us of the importance of civics education so that our own democracy will continue to thrive and be protected.

Justice O'Connor, I am going to yield to my friend Senator Grassley, but as I told you privately, Barry Goldwater was such a good friend, and at his request I moved into his old office, and I have been there now for 30 years. You would blush to hear all the good things he said about you, some of it in language that I will not repeat in the hearing, but you know Barry.

Senator Grassley.

Justice O'CONNOR. Senator Grassley.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you. Thank you, Mr. Chairman, for holding this hearing, and I remember one we had last year that was very valuable with Breyer and Scalia, as I recall. Very valuable. So it is going to be valuable to have you here as well, and I am glad to greet you for coming.

Justice O'CONNOR. Thank you.

Senator GRASSLEY. You were not only the first woman to serve on the Supreme Court, you are the first Supreme Court Justice I ever had a chance to vote for.

Justice O'CONNOR. Oh, for heaven's sake. Good.

[Laughter.]

Senator GRASSLEY. My first vote for confirming somebody to the Supreme Court. And I can say that, looking back after all your years of services, your performance justified the confidence that the Senate placed in you.

We would like to believe that our judges, whose independence is guaranteed by the Constitution, rule based only on the Constitution and not on their policy preferences. Judicial independence was established to make the courts independent of the other branches and independent of popular view. It is not designed to make judges independent of the Constitution so that they can impose their policy preferences. We hear that if only our citizens properly understood the role of the courts, unprecedented attacks on judicial rulings would vanish.

This is a view that I believe is at odds with both the current reality and the history of our country. In fact, the leading reason for the so-called attack on judicial independence is often judges themselves. Only last week, the New York Times reported that only a few weeks before the Court's health care decision, the public ap-

proval of the Supreme Court's performance was at the 44 to 36 margin. But the article reported that after the ruling, as many Americans disapproved of the Supreme Court as approved of its performance. That decision, which some have speculated was issued at least in part to reduce political opposition to the Court, appears to have accomplished exactly the opposite result, if you want to go by that poll.

The article states that most Americans believe the decision was based mainly on the Justices' personal or political views. Only 30 percent of Americans say the decision was made mainly on legal analysis.

For myself, I respect the decision, even if I am disappointed by that decision, and I question no one's motives. But I do not think that the poll results would be different if only the public had a better understanding of the Court. In fact, I think the poll reflects that the public does have reason to suspect that politics enters into some Justices' decisions.

They accept the decisions, anyway, as shown by the polling on 18 earlier major cases presented in that article, two-thirds of which were unpopular with the population when they were decided. Although unfortunate, this perception should not be a cause for alarm so long as it does not lead to threats of violence, threats of impeachment, or threats to imprison judges for their rulings. Much more serious threats to judicial independence have occurred regularly in our history when the citizens were convinced that what the courts presented as law was not constitutionally sound, such as when Andrew Jackson refused to be bound by the Supreme Court's opinion on the constitutionality of the Bank of the United States; or the Court's rulings on Indian rights; or when Abraham Lincoln said that the *Dred Scott* decision was "erroneous" and refused to accept it as a precedent because it reflected "apparent political bias;" or when Theodore Roosevelt ran the most successful third-party candidacy in our country's history on a platform of "restriction of the power of the courts so as to leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy," including the ability of voters to overturn constitutional rulings of State courts; or when Franklin Roosevelt tried to pack the Supreme Court because of its rulings striking down New Deal legislation.

So let us keep everything in perspective. It is not a violation of judicial independence for a Senator to criticize Court rulings that he or she believes incorrect. It is not a violation of judicial independence for a Senator to conduct legitimate oversight of the judiciary. Those are appropriate ways of ensuring accountability. That is all within the constitutional concept of checks and balances.

But judicial independence could be jeopardized when a President of the United States in a State of the Union speech misstates the holding of a Supreme Court case in front of Justices when they cannot respond. Judicial independence could be threatened when, after a pending case is briefed or argued, the President publicly misstates the process of judicial review and claims that the Court's legitimacy and a particular Justice's legacy will be tainted unless the Court decides the case the way that the President wants that case decided. And judicial independence is certainly weakened if

Justices give in to those attacks rather than decide based solely on the Constitution or even appear to do so.

Finally, I appreciate Justice O'Connor's work in advancing civic education. I believe that all citizens in a democracy benefit from the participation of informed and active citizens. I think that the iCivics site is a good one, although I wish "Court Quest" told students that citizens can challenge laws on constitutional grounds in State as well as Federal courts. It should also say that a trial held for violation of a State criminal law claim to violate the Federal Constitution would be held in State and not Federal court. And although I have supported Federal efforts to promote greater understanding of our constitutional system, I do not believe that the Federal Government should develop and mandate civics standards, and I do not think the Framers of the Constitution thought they had given Congress the authority to impose such standards?

Justice O'Connor, I look forward to listening to your views.

Justice O'CONNOR. Thank you.

Chairman LEAHY. Thank you. And, Justice O'Connor, we are talking about iCivics, and here is one of the copies of it. And I could not help but think as I look at this, the young man on the front looks very much like a grandson of mine. I have got to make sure that all five of our grandchildren get a chance to be involved with it.

But, please, Justice O'Connor, we welcome you here and the floor is yours.

STATEMENT OF THE HONORABLE SANDRA DAY O'CONNOR, RETIRED ASSOCIATE JUSTICE, THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D.C.

Justice O'CONNOR. Thank you very much, Senator Leahy, and I will welcome questions that you and Senator Grassley want to ask to direct the conversation. You have brought up the subject of iCivics.

It is a website that relies on games to teach young people how Government works. We have had a wonderful group of skilled teachers of middle and high school levels who have helped advise us on the topics that we should cover on the next iCivics game and so forth. They have helped us throughout the process of developing the website. So we have attempted to develop games that enhance the ability of teachers to teach young people how our Government works.

I went to school a long time ago. I went to school in El Paso, Texas. My parents lived on a ranch that was too remote from any school, and so I lived with grandparents in El Paso during the school term and went to school there. And I well remember having a lot of civics classes, mostly based on Texas history, and I got pretty sick and tired of it, to tell you the truth. I thought it was miserable. So I am hoping that today's civics teachers will be able to make it more interesting than I found it in those days.

That is one of the reasons for developing in the iCivics website a series of games that young people play that illustrates legal principles we are hoping to teach. And the system is working very effectively.

Recently Baylor University in Texas asked to do a study of iCivics through their education department to see the effectiveness of the program with students. Their study produced really exceedingly encouraging results. I was thrilled to get the report from Baylor about what they found from the use by students of that website and the games in it. So I am encouraged by it, and it shows me that young people need to know how our Government works and how they are part of it.

It is not self-evident, and in schools today I do not think it is widely taught. Young people want to know how to be effective. They want to know their role as citizens and how to make things happen at the local level, at the State level, and the national level. iCivics tries to do that and tries to help young people develop their own proposals and programs and learn in the process more about how Government works.

I think that the effort is effective and being appreciated. I have chairpeople now in all 50 States, including in Vermont, and it is doing well, I think. I welcome feedback from you and others, your constituents, on how they think we can improve what we are doing. And we have kept the program free so schools can use it at no charge. That is important in today's circumstances where money is not often available for schools to develop new programs. But I hope that your constituents will report back to you occasionally on the effectiveness of iCivics and keep you informed, and I welcome your suggestions as you have them when we go forward. And Senator Grassley, the same, I hope I will hear back from you if you have good suggestions for us.

Chairman LEAHY. Thank you very much. Again, I appreciate you doing that. I will make sure that we also get some of the feedback from Vermont.

Justice O'CONNOR. That is good.

Chairman LEAHY. I will check with Coventry, Vermont.

Justice O'CONNOR. Absolutely. The town where my ancestors settled after the revolution. It has not grown much, I am afraid.

Chairman LEAHY. I know. That is an area called "the Northeast Kingdom," and some very special people come from that part of the State, including my wife of nearly 50 years.

Justice O'Connor, you have often commented about how attacks on judges can be a threat to judicial independence.

Justice O'CONNOR. Yes.

Chairman LEAHY. I was wondering how you felt about the heated rhetoric that followed the final days of the Supreme Court session last month when a member of the Court was labeled a "traitor" and accused of somehow betraying the President who nominated him to the Supreme Court as though he should follow political direction from a President.

Justice O'CONNOR. It is unfortunate because I think comments like that demonstrate only too well the lack of understanding that some of our citizens have about the role of the judicial branch. And I think the Framers of our Federal Constitution did a great job in understanding themselves that the judicial branch needed to be able to make independent decisions on the legitimacy, the lawfulness of actions at the State and Federal level when they are prop-

erly raised in court. The Framers did a really good job in that regard.

Not every State has followed the Federal model. Under the Federal model, judges are not elected. They are nominated by the President and confirmed by the Senate. In many States, that is the process, but not in all. Many States have popular election of judges, and the result of that has been the need for candidates to raise money for their election campaigns. I think that has a corrupting influence on the selection of judges, and it is disappointing to me to see the many States that still use judicial elections. I hope over time more States will follow the Federal model and have a system of judicial appointments.

Many of the States that have these have a process, however, of confirmation or selection that involves public input, and that is fine. But I think the Federal model has been a good one for the States.

Chairman LEAHY. I happen to agree, and that is the model that we follow in Vermont.

Justice O'CONNOR. Yes.

Chairman LEAHY. And it has worked very well, and it has taken politics completely out of our judicial system. In fact, we recently had a new Federal district judge following—her name was recommended from a bipartisan screening board. I recommended her name to the President. But, interestingly enough, she had been first nominated to our State court by a Republican Governor, actually someone who once ran against me.

Justice O'CONNOR. Oh.

Chairman LEAHY. And I have no idea—to this day I do not have the foggiest idea what her politics are and I do not care.

Justice O'CONNOR. Yes.

Chairman LEAHY. What I do like is the reaction we have gotten from Vermont of what a great judge she is being.

Justice O'CONNOR. That is good.

Chairman LEAHY. You do have to keep it out of politics, and would you agree with that, that while a judge might be and should be appreciative, as you were of President Reagan's nomination, your allegiance is to the law, not to the President who nominated you?

Justice O'CONNOR. I think the allegiance of every Federal judge is to the Constitution of the United States and the laws that are adopted by Congress. And that allegiance, I think, enables judges to resolve the cases that come to them. They rely on precedent. We follow the British model of years ago in which a case resolved by the Nation's highest courts, the principles established will be followed by the lower courts in the future until the courts change the model or the rule.

I think the system works quite well. It has served us well in the United States through the years, I think. We have a good Federal court system overall, in my opinion.

Chairman LEAHY. Well, let me ask you about that, because during the primaries earlier this year, there were a couple candidates—or more than one, anyway—who said that those of us in political office should be more involved in the courts. One even suggested totally eliminating one of the circuit courts of appeals be-

cause he disagreed with one of their opinions. We have heard others say that because we have the power on the courts other than the Supreme Court to set their jurisdiction, that anytime we have a disagreement, we should have a hearing and remove that.

I remember standing side by side with Barry Goldwater on the floor to fight an effort by one Senator at court stripping even though the case where they wanted to strip the jurisdiction of the court was one where Senator Goldwater disagreed with the conclusion but felt that the court stripping was bad precedent.

Would you agree with that?

Justice O'CONNOR. I certainly do. I think our system is a good one. Sometimes a court, a Federal court, for example, will resolve some legal issue in a way that not everyone likes, and certainly in a body like the United States Senate, comprised of Republicans and Democrats, and I guess occasionally an Independent, you are going to have some disagreement among the members of this very body about whether a particular ruling of a Federal court is correct or the best ruling that the court could have made. Obviously there are going to be differences of opinion. But under our system, an issue that is divisive sometimes will come up again through the courts in a different posture. You will have related issues, and over time the courts themselves will have a chance to review the precedents and the effectiveness of earlier decisions. And the courts can make changes over time in the applicable legal principles if they think that is indicated. The system has served the Nation quite well, I think.

Chairman LEAHY. One last question and then I will yield to Senator Grassley, but let me just ask you this. We have always talked about the question of diversity on the Court, and I want to make sure people know you were the first woman to serve on the Supreme Court, and I praised President Reagan at the time, as you know, for that.

Justice O'CONNOR. Yes.

Chairman LEAHY. But diversity is more than just that. You had diversity of background. You had been in elective office. You had had a lot of other experience. Today it seems on the Court, while we have some wonderful people, they come just from the same judicial monastery, as I call it, the same background. Do you think we should be pushing for more diversity?

Justice O'CONNOR. Well, I think that over the Nation's history we have had a very diverse group of judges on the Court, and early, in the first 100 years, let us say, we probably had Justices nominated from very diverse backgrounds. That does not happen as often today. As you point out, they are more apt to be people who have served on Federal district courts, Federal courts of appeal, and then being considered for this Court.

That is not a requirement, and the President with a vacancy to fill on the Court is free to choose people with very different backgrounds. In fact, there is no requirement that the person appointed be a lawyer. I think they would have a pretty hard time if they had not had legal training, so I hope that is not abandoned in the process. But there is no requirement, as you know, in the selection of a Justice. In the first 100 years, I think we had a lot more diversity on the Court.

Chairman LEAHY. Thank you very much.

Senator Grassley.

Senator GRASSLEY. This is not one of the questions I was going to start out with, but you did bring up about election of State justices.

Justice O'CONNOR. Yes.

Senator GRASSLEY. Does what you said, leaning more toward the Federal system than what the various States have, does that apply also to retention elections?

Justice O'CONNOR. Well, many States that still use appointments for State judges include a system whereby after so many years on the bench, the judge goes on the ballot in the State for the voters to decide whether to retain the judge, yes or no. That is the system we actually have in Arizona, and that is a system that I helped develop in my prior years in Arizona. Then the voters have a chance to look at the record of the judge and say, "Do you want to keep this judge, yes or no?"

Not many are turned out of office under that system, but a few have been for a variety of reasons. I think it is a perfectly valid system for a State to adopt. The Federal system does not have that. You do not have a system whereby after a few years on the Supreme Court the voters in America can have a chance to say whether a Justice should be retained or not, and I think the Federal system has worked very well. I am not proposing a change. But those States that use retention elections have had pretty good luck with them. Very few people are turned out.

Senator GRASSLEY. OK. I want to refer to an article of 2008 that you wrote, Denver University Law Review: "I regret that threats to judicial independence seem to be occurring with record frequency. Members of Congress have faulted the Court for their decisions on various issues."

I do not find any fault with what you wrote, but I would like to explore with you some situations and see whether you think they could pose threats to judicial independence.

Could judicial independence be threatened if the President at a State of the Union address in front of Justices who are not in a position to respond mischaracterize and criticize Supreme Court decisions?

Justice O'CONNOR. Well, I do not know that it threatens judicial independence. It is just not what one expects as a citizen to hear a President in a State of the Union message get specific about Justices' individual actions on cases and then say the President disagrees. It is certainly possible for a President to do, but it is unusual. It is not how that time is usually spent by Presidents.

Senator GRASSLEY. Another question. Could judicial independence be jeopardized if the President, while a case has been briefed and argued and is awaiting decision, misstates a doctrine of judicial review, claim that a particular ruling would harm the Court's legitimacy and claim that a particular Justice's legacy will be tainted unless he decides the case in a manner that the President presumably wants?

Justice O'CONNOR. Well, if there is a pending decision at the Supreme Court and a President were to express views along those lines, it would be surprising. It is unusual. I think we have not

tended in this country to speak out at some higher political level, either at the State level or the national level, about a decision in a pending case. I guess it could happen, but it is not what we expect, and it is not ideal.

Senator GRASSLEY. Lastly, could judicial independence be jeopardized if a Justice decides a case in a different way than his original view if he does so due to Presidential pressure or out of concern that the Court would sustain political damage otherwise?

Justice O'CONNOR. Well, I am sure that many things go through the minds of a Justice in a pending case where a tough issue has to be decided, and the Justice may, before the decision is made, learn things that cause the Justice to shift the tentative outcome in some fashion for that Justice. I mean, you can continue to learn up until you have signed on to some decision, and I would not preclude that. I think that is always possible. But it is not often that it occurs.

Senator GRASSLEY. Since I still have time, what would you think are the most important elements of a court system that students should learn?

Justice O'CONNOR. The system needs to give the public some assurance of the independence of the judge making the decision, the notion that the judge should base the decision on the law and a judge's understanding of the law and the requirements of the Constitution and the laws passed by Congress and to do so fairly and independently. That is the concept, and that is what I think the average citizen should be able to understand is the concept and trust that that is what is going to happen.

Senator GRASSLEY. I am going to make a comment. I do not know want you to react because I do not where you are on this and I do not want you to spoil something I am trying to do, but the Chairman and I promote cameras in the courtroom, and we do it because we think that there is a lot of mystery about the judicial branch of Government, and the education of the people by having more people have access to the courtroom would be a very good thing to do, and so I am taking my last minute here to advocate for cameras in the courtroom, including the Supreme Court.

Chairman LEAHY. If you want to take more than a minute to advocate for that, I am all for it.

[Laughter.]

Senator GRASSLEY. I am done. I will yield back my time.

Chairman LEAHY. Did you want to say anything to that, Justice?

Justice O'CONNOR. I am happy to.

Senator GRASSLEY. Only speak if you speak in favor of it.

[Laughter.]

Justice O'CONNOR. Well, then I had better keep my mouth shut.

[Laughter.]

Chairman LEAHY. Justice O'Connor, I have to tell you, you and I have known each other for a long time.

Justice O'CONNOR. Yes.

Chairman LEAHY. And it is refreshing having you here.

Senator GRASSLEY. I would respect your view, anyway. I want you to know that.

Justice O'CONNOR. Thank you.

Chairman LEAHY. One of the valued members of this Committee, Senator Klobuchar, is also a former prosecutor. I have a soft spot in my heart for former prosecutors, as you know.

Justice O'CONNOR. Yes.

Chairman LEAHY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much. Thank you, Justice O'Connor, for being here.

Justice O'CONNOR. Senator, thank you for being here.

Senator KLOBUCHAR. I truly appreciate it, and you should know that when we had the confirmation hearings for Elena Kagan and for Justice Sotomayor, I spoke about your background, not just as being the first woman but also, as I think it was—I am just doing this by memory—that before the age of 14 you were able to use a rifle, herd cattle, and ride a horse.

Justice O'CONNOR. Absolutely. I grew up on a very remote ranch, and everybody had to do everything as soon as they were old enough to do it.

Senator KLOBUCHAR. Exactly, and I would assume that some of your interest in the civics education was grounded in the fact that you came from such humble beginnings and were able to achieve so much in this country. And I wanted just to start with that, is where you saw this with civics education, what do you think the reason is that we are seeing such a decline in civic education, how do we improve it, and specifically the iCivics you are talking about.

Justice O'CONNOR. Frankly, part of it is because we have learned, to our dismay, that our American students, when tested on math and science, are not doing as well as students of an equivalent age from many other countries, and I think that distresses us because our country has been pretty advanced in math and science, and we do not want to see our students lag behind. And that has promoted an effort to increase education efforts in those areas, and it has resulted in the dropping of civics courses. I mean, there are only so many hours in a day, and schools have to concentrate on something, and they have tended to maybe do more math and science and less on civics.

And I would just like to be sure that we continue to teach some civics to students as they go through. My own concentration has been at the middle school level because by then the brain is formed and young people are eager to learn, they are receptive and they can get it, and it is not too early to start.

So I think it is important, and students want to know how Government works, how their city works, their county, their State, the Nation. They want to be part of it. And the iCivics program teaches by way of games where the young people play a role and they play the games and learn. It is very effective. And in many cases—and I now have it in use in all 50 States, not as widely as it should be but it is started in all 50 States—students using it can learn how to take a project and get it through some city council level or some county board level or even a State legislative level, and it is great when they do, because the earlier you learn how Government works and how you can be part of it, the better it is.

Senator KLOBUCHAR. I agree. My daughter is 17 so she has been through this, and one of my favorite projects that she did is she

interviewed Senator Murkowski for an hour and wrote—I think it is about a 50-page PowerPoint presentation for her class.

Justice O'CONNOR. It is fabulous when they do, or——

Senator KLOBUCHAR. Lisa said it was more researched than she had seen on any——

Justice O'CONNOR. Or when they get a specific project and run it through somewhere——

Senator KLOBUCHAR. Right.

Justice O'CONNOR.—to get something changed, it is great.

Senator KLOBUCHAR. It is very good, and I come from a State that actually we have the highest voter turnout, I think we were number two for the census the last time, and it is just such a value in our State of getting involved. And as people feel increasingly distanced from their Government, from their courts——

Justice O'CONNOR. That is right.

Senator KLOBUCHAR [continuing]. I think it is a major problem, and so much——

Justice O'CONNOR. It is.

Senator KLOBUCHAR [continuing]. Of it is ours to fix.

Justice O'CONNOR. Yes.

Senator KLOBUCHAR. Because as a former prosecutor, we would find out that it was not always the result in a case—that matters to people a lot, but it is how they are treated in the system.

Justice O'CONNOR. Right.

Senator KLOBUCHAR. And if they understand what is going on, it makes them trust the system. We did surveys about this with——

Justice O'CONNOR. No question.

Senator KLOBUCHAR [continuing]. Domestic violence victims. They understood sometimes a case would fall apart, but if you were not filling them in on what happened and they had no understanding, they would just feel completely mistreated by the system.

Justice O'CONNOR. Yes. That is right.

Senator KLOBUCHAR. I appreciate your emphasis and look forward to working with you on this. I know you have done some work in Florida and other places.

Justice O'CONNOR. Yes.

Senator KLOBUCHAR. I just had some other questions. One is about our Supreme Court nomination hearings. When I came in, I think Senator Grassley was asking about this. But what do you think we could do to improve them? I think they are still important for the public to be able to see a Supreme Court nominee answer questions, but what do you think could be done better?

Justice O'CONNOR. It is miserable from the standpoint of the nomines.

Senator KLOBUCHAR. Really?

[Laughter.]

Justice O'CONNOR. Well, it is horrible. From the standpoint of the public, it is perhaps the only chance the public will have to see a nominee and have some appreciation of their style and their manner and how well they answer the questions, or how poorly, and to have some understanding of the process. It really does matter to the public. So I think the system in that regard works fairly well.

Senator KLOBUCHAR. And what do you think about the—you know, the nominee answering questions I think is key, but then afterward there is this part where we have sort of like both sides, those who favor the nominee or put on witnesses and those who oppose.

Justice O'CONNOR. Yes.

Senator KLOBUCHAR. And to me, honestly, that seems—I know people want to have a chance, but it seems just so political in terms of——

Justice O'CONNOR. Well, it is, but that is the nature of the political House and Senate. I mean, you are the political branch of Government here.

Senator KLOBUCHAR. My favorite one was one of the people that came on for, I think it was, Justice Sotomayor. He had known her when she was 12, but then he went on, I think, to be at the NAACP or something, he had a reason to be there. But I said, "Well, what was she like when she was 12?" And he said, "She was very judicious."

[Laughter.]

Senator KLOBUCHAR. So it just made me think maybe we could change that part of the process because it just seemed so pro and con, and that is one idea I had.

Justice O'CONNOR. It would be hard to do because you have a vote at the end, and the members want to express some views.

Senator KLOBUCHAR. Yes.

Justice O'CONNOR. So that is hard to change, I am sure.

Senator KLOBUCHAR. It is. And then one last thing about—I know you have been a vocal advocate on the problems with judicial elections.

Justice O'CONNOR. Yes.

Senator KLOBUCHAR. Have we seen States ending judicial elections in recent years? And are there any reforms that you can think of that can be made, short of ending elections?

Justice O'CONNOR. This is really important. I think the Federal model of appointment and no election of the Federal judges is the best model, and some States have followed it but not all. And a number of States still have a totally elective process for selecting judges. I think that is very unfortunate because it means raising money for campaigns, and there is just no way to be comfortable with that in the judicial scheme of things. It is not good to have judges that you know have had to take campaign contributions from certain interests. It is a worry.

So I hope that more and more States will follow the Federal model of not having judicial elections. Many States—in fact, my own—have retention elections periodically so that after a period of years, the judge's name goes on the ballot, and the voters can vote whether to keep the judge or not. They are not running against anyone. It does not require massive input of funds, and that seems to have worked fairly well. Not many judges are removed in that process, but it is one way of having the voters involved to some degree, and it seems to have worked to some extent.

Senator KLOBUCHAR. Very good. Well, thank you so much for being here today.

Justice O'CONNOR. I am so glad to be present.

Senator KLOBUCHAR. I look forward to working with you.
Justice O'CONNOR. Thank you.
Senator KLOBUCHAR. Thank you.
Chairman LEAHY. Thank you very much.
Senator Lee.
Senator LEE. Thank you, Mr. Chairman. Thank you, Justice O'Connor, for joining us.
Justice O'CONNOR. I did not see you come in. I am sorry.
Senator LEE. That is OK.
Justice O'CONNOR. I should have turned my head.
Senator LEE. I am easy to forget.
[Laughter.]
Senator LEE. But it is a pleasure to have you with us.
Justice O'CONNOR. Thank you.
Senator LEE. I have many fond memories from my childhood watching my dad argue cases before you on the Supreme Court where you would ask him questions from behind the bench. I do not think I ever imagined as a 10-year-old that there would come a time when I would be sitting behind a different bench and asking questions to you.
Justice O'CONNOR. Your father was marvelous, by the way. He was such a good lawyer. He really did a great job, and we miss him.
Senator LEE. Thank you. Thank you.
Chairman LEAHY. And I agree with that, Mike, I want you to know.
Justice O'CONNOR. He was fabulous.
Senator LEE. We miss him. He was a proud Arizonan, as you know.
Justice O'CONNOR. Yes, he was. And I used to see him when I was in the State Senate and in committee hearings, as you are sitting here, and he would come in and present material on various issues affecting the State, and he was effective in that regard as well. He really was an amazing man.
Senator LEE. That is good to know. Thank you very much.
I wanted to follow-up with you about a comment you made a few minutes ago about retention elections in State judicial positions.
Justice O'CONNOR. Yes.
Senator LEE. You indicated that the impact that—the tendency to politicize the State judicial systems that those retention elections might have is relatively limited for the reason that they tend not to result in the removal of the judicial officer on——
Justice O'CONNOR. Not very often.
Senator LEE [continuing]. Very many occasions.
Justice O'CONNOR. Right.
Senator LEE. Is there a possibility, do you think, that they might nonetheless have some politicizing effect, just the in terrorem effect of the retention election, is there a chance that that might affect the judge's decisionmaking process?
Justice O'CONNOR. Well, I guess there is always a chance. I prefer a system that does not involve elections at all, but many States do have the retention elections. And at a minimum, it gives the voters an opportunity at some point down the line to say, yes, I am

satisfied with this judge and I vote to retain the judge, or the reverse. And not many are removed by retention election.

Senator LEE. And I guess one critical difference between the retention election and another type of election is that it is not contested.

Justice O'CONNOR. That is right. There are not a lot of campaign contributions being raised.

Senator LEE. In some cases, not any in some States.

Justice O'CONNOR. Right. In most cases, I think not any.

Senator LEE. Yes, so it really is——

Justice O'CONNOR. But it is possible.

Senator LEE. And it typically requires, I think, something of a supermajority vote to oust a jurist, depending on——

Justice O'CONNOR. It depends on the State.

Senator LEE. That is right. What about the judicial nominating commissions that are within States? I believe you have been kind of an advocate of what is sometimes referred to as the Missouri approach or——

Justice O'CONNOR. Yes.

Senator LEE. Whereby State judicial nominating commissions meet and will give advice to the Governor, will advise the Governor on whom to appoint.

Justice O'CONNOR. Yes.

Senator LEE. Do you support that model?

Justice O'CONNOR. I do. It is a model that I helped support in my home State of Arizona and that we have had experience with now over many years, and it has worked well. So I think that is a pretty decent model.

Senator LEE. Is there an argument to be made that commissions like that might have a tendency to insulate the appointing Governor from the political process in a way that is not helpful and in a way that might make the appointing Governor less accountable to the voters rather than more?

Justice O'CONNOR. Well, I have not seen it that way because the Governor has to make the appointment and say, yes, I am going to consider these names and here is who I pick. I think it has worked all right.

Senator LEE. Yes, and I suppose that—in my State, I believe, the Governor has the option of rejecting the entire slate if he or she feels that——

Justice O'CONNOR. Yes, yes, and that is true in my State, too. If the Governor feels she did not get good names here, she can reject the whole batch and ask for more names.

Senator LEE. If you had your druthers, I think I heard you say a minute ago you think the Federal system is the best model.

Justice O'CONNOR. Yes.

Senator LEE. Is it the best model just for the Federal Government or do you think the best model for the States would also be the Federal system whereby the Governor would have appointment power——

Justice O'CONNOR. That is up to each State to decide, what do you feel in your State is the level of voter participation that you need to have to make the system work for your State. And if some mixed model, such as most States seem to have today, where voters

have a retention election where they can weigh in, we do not have that at the Federal level, you know.

Senator LEE. Right.

Justice O'CONNOR. But if a State thinks that helps, fine. It seems to not do too much damage and it is OK. So if the voters in a State approve of that, I think that is all right.

Senator LEE. OK. But you are just fine with the Federal model the way it is; you are not advocating a change.

Justice O'CONNOR. That is correct.

Senator LEE. OK. Now, when a State system gets really bad—I have long shared, by the way, your concerns with States that have contested partisan elections to fill the vacancy at the outset because I think it is difficult to reconcile that with the need for judicial independence.

Justice O'CONNOR. Right.

Senator LEE. Where you have a State system that follows that approach and you have a system that apparently is inappropriately influenced from time to time in a destructive way, do you think there is ever a reason for the Federal Government to consider intervening, or is that up to the State?

Justice O'CONNOR. Well, I think it is up to the State, but certainly most States, if you are going to consider something that affects the State at least, are going to have an opportunity to hear from voters on the proposals and have some debate at the State level. And that is good. You will hear all this if you do.

Senator LEE. But you certainly would not regard that as a due process concern of the sort that would warrant Federal legislation requiring States to do it one way or the other?

Justice O'CONNOR. No, I do not think so. We have left the States free to choose their own method of judicial selection.

Senator LEE. Right. And I certainly agree with that.

Finally, you were a long-time advocate of federalism while on the Supreme Court, a strong believer in the fact that there is a difference between State power and Federal power.

Justice O'CONNOR. Yes.

Senator LEE. And we have to respect that in order for our system to operate correctly.

Justice O'CONNOR. Yes.

Senator LEE. What would you advise the Federal lawmakers about how best to protect that system—not the Federal jurists but the Federal lawmakers about how they can protect the Federal system and the distribution of power between State government on the one hand and the Federal Government on the other hand?

Justice O'CONNOR. Well, all members of this body, the Senate, come from one or the other of the States. You are all representatives of your States, and you have had experience in your own State with what the voters care about in terms of judicial selection. I am sure all of you have had that. So I do not think I need to give any advice on the topic. You are going to have plenty of it at the State level, is my guess.

Senator LEE. We do get advice from time to time.

Justice O'CONNOR. All right.

Senator LEE. Thank you very much, Justice O'Connor. I see my time has expired.

Justice O'CONNOR. Thank you, Mr. Lee.

Senator LEE. Thank you, Chairman.

Chairman LEAHY. Thank you very much, Senator Lee. And as I told you privately before, I agree with Justice O'Connor's reference to your father, and I cherish knowing him.

We have Senator Blumenthal of Connecticut, former Attorney General of his State, and I will yield to Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. And as a former Attorney General for some 20 years, I am a very strong believer in federalism.

Justice O'CONNOR. Yes.

Senator BLUMENTHAL. And I would agree with Senator Lee that we get advice, but I also would suggest that we need advice, and so any ideas you have on that score, but also I want to focus on a point that Senator Grassley made in his opening remarks, which is the apparent decline in public approval, poll numbers. We all dismiss poll numbers when the results do not suit us, but they still are reflective of something happening. And the reason we are here today in a sense is because of the need to educate the public about what you did for so many years with such distinction and dedication in serving on the U.S. Supreme Court, and we all have a reverence, if not respect, for the institution and the need to preserve——

Justice O'CONNOR. Yes.

Senator BLUMENTHAL [continuing]. The legitimacy and credibility of the institution. So I wonder if you would give us your assessment as to why there has been this decline in the public's approval or respect for the institution.

Justice O'CONNOR. I wish I knew. I did not conduct the polls, so I am not sure. I have read some articles about the polling that took place and the argument being made that perhaps the decline—the percentage of U.S. voter approval of the Supreme Court historically has been higher, generally, than that of the other two branches, and in very recent months, it seems to have declined rather substantially. And a suggestion has been made that that began with the *Bush* v. *Gore* decision. I have no idea if that is correct in terms of the assessment of the polling. It is conceivable because that was a very tense case that involved the holdovers from a very close election, and people would probably feel deeply about it and maybe be concerned.

So perhaps that was the tipping point for a decline. I hope the decline will be temporary because the Supreme Court functions extremely well. I think as we look worldwide, we can be proud of our Court. It has served the Nation well and I think by and large is a marvelous institution.

So I would think over time opinion would turn upward again. I certainly hope so, and I would expect that.

Senator BLUMENTHAL. And I would agree with you certainly in the assessment of the Supreme Court's work and in the hope that public approval will increase over time.

Justice O'CONNOR. Yes.

Senator BLUMENTHAL. And as one who has done arguments in the Court and has been a law clerk in the Court and has watched and observed the Court, I think the public often simply does not

see the work that the Court does, because by and large it is not *Bush* v. *Gore* or *Citizens United*.

Justice O'CONNOR. That is right.

Senator BLUMENTHAL. Its day-to-day work is much more mundane and complicated and challenging in certain intellectual ways, but less politically charged.

Justice O'CONNOR. Right.

Senator BLUMENTHAL. And so I wonder—and I know you were asked about it earlier—whether increasing public access to the Court's work, whether——

Justice O'CONNOR. Like cameras in the Court?

Senator BLUMENTHAL. Well, I know you were asked about that. [Laughter.]

Justice O'CONNOR. Well, I did not really address it, but I do think it is important to remember that every word that is said in that courtroom is transcribed and available that same night, and if anybody wants to see and read what was said, there it is in black and white. There it is, you have got it in hand. So it is not that there is a lack of ability to know what is going on. It is there. It is just do we have to have it on camera and on the television, or is it enough that it can be available that very night and you can read it? I guess it boils down to that.

I am a reader so, you know, do not ask me probably. I tend to read more than I watch television.

Senator BLUMENTHAL. Well, I am not going to comment on reading versus television because everyone has his or her own style——

Justice O'CONNOR. Yes, that is right.

Senator BLUMENTHAL [continuing]. Of learning. But in light of the prevalence of television and the impact, the powerful effect of the visual portrayal, I wonder whether you think that it might be worth considering opening at least certain arguments to broader view, and if not that, whether there is some way of increasing the potential attendance at Supreme Court arguments, because, after all, the number of people permitted in the courtroom is very small compared to the numbers who would like——

Justice O'CONNOR. It is limited because the courtroom is not that large, so you are never going to have a huge crowd that can sit in the courtroom. There are some adjacent chambers where you can hear it as it is argued, but not see it. And I guess this is a discussion that is going to continue for a while. You have members of the Court at present who are not at all comfortable with televising the proceedings, and I think if and when a change is made, it probably is more likely to be made when the members of the Court are willing to accept that.

Senator BLUMENTHAL. And some of the members of the Court have sat where you are right now and said, in effect—and I am taking great license with their remarks—in effect, not over my dead body. That is how vehement they were in opposition to televising the Court hearings.

Justice O'CONNOR. Yes.

Senator BLUMENTHAL. But I think, if I may respectfully suggest, you are in a unique position because not only are you a highly respected member, former member of the Court, but also have the

perspective of many years in different branches and at the State level and so forth.

Justice O'CONNOR. Yes.

Senator BLUMENTHAL. So your opinion I think would carry great weight if and when you are willing to set it forth.

Justice O'CONNOR. Well, my opinion is there should be general agreement that putting cameras in the court is a good move to make. If there is severe opposition coming from the Court itself, that is a source of concern, I think. It is best if everybody is sort of in sync on that kind of a move.

Senator BLUMENTHAL. I want to thank you for being here today, for honoring us with your presence, and for your many, many years of extraordinary work for our justice system. And my time has expired, but I really think that your presence and your testimony has helped to enhance education. Any additional thoughts I know that you will let——

Justice O'CONNOR. Well, thank you, Senator. I really have been spending enormous time on my iCivics effort to educate young people how our Government works and how they can be part of it. I will say that I think the method we are using with the games is extremely effective. We have had it tested. Baylor University recently completed a rather extensive test, and they came back with extraordinarily good reviews of the effectiveness, which is encouraging in the extreme, and we will continue to develop some additional games on somewhat different topics to keep people informed and engaged. It works with young people, so I am excited about it. And it would be wonderful, if when you speak to schools in your States, you will encourage them to use it because it does work.

Senator BLUMENTHAL. I would be honored and delighted to do it.

Justice O'CONNOR. Good.

Senator BLUMENTHAL. Very much so.

Justice O'CONNOR. Good. That is great.

Senator BLUMENTHAL. And I hope that we can follow-up as a member of the Committee and learn more about how we can get into the details.

Justice O'CONNOR. Good. I have managed to keep it free, and with today's costs of changing programs, that has been important.

Senator BLUMENTHAL. Free is good.

Justice O'CONNOR. Yes, I think so, too.

[Laughter.]

Senator BLUMENTHAL. Thank you.

Senator KLOBUCHAR. Mr. Chairman?

Chairman LEAHY. Yes?

Senator KLOBUCHAR. I just want to note for the record that one Justice who came before this Committee, Justice Kagan, to follow-up, actually did say she wanted it televised. I know you know that, Justice O'Connor.

Justice O'CONNOR. Yes.

Senator KLOBUCHAR. So maybe we will see that change that you referred to over time. So thank you very much.

Justice O'CONNOR. Thank you.

Chairman LEAHY. As one of the ones who was here when we had the debate of televising the Senate, I remember we had—I do not know, Jeff, if you were here at that time or not. We had some vehe-

mently against it, some in favor of it, others who could go either way. Notwithstanding some grandstanding we have seen since then, I think it has been a good thing for the American public to see how we deliberate.

Senator Sessions, thank you for being here. Incidentally, before you came in, we noted that there are a lot of students in the room, and that is no doubt in relation to the Justice's iCivics program.

Justice O'CONNOR. Yes.

Chairman LEAHY. So we have a lot of students here in the room. Go ahead, sir.

Senator SESSIONS. Justice O'Connor, it is great to have you with us.

Justice O'CONNOR. Thank you.

Senator SESSIONS. I just so truly believe—and having traveled around the world a good bit, Armed Services Committee, in some difficult places, I am more convinced of the precious nature of the rule of law in America than I have ever been.

Justice O'CONNOR. Absolutely, Senator. It matters. And we have been promoting that since the breakup of the Soviet Union. And I think the American Bar deserves some credit here because when the Soviet Union began to break apart and these nation states began to form, lawyers gathered together and they went over and served as unpaid volunteers in many of these forming countries and helped develop judicial systems and the notion of the rule of law. And it really has been a good thing.

Senator SESSIONS. I could not agree more. But I would just say I remember early after the Iraq invasion being with General Petraeus in Mosul, and he had re-established a court.

Justice O'CONNOR. I know.

Senator SESSIONS. They found some judges, and they tried to appoint lawyers and have trials like we do.

Justice O'CONNOR. Yes.

Senator SESSIONS. But I think you know—and the real truth is it takes many, many years, decades, even centuries to create the kind of legal system we are blessed to have in the United States.

Justice O'CONNOR. It does. You cannot do it overnight or even in a year or 2 or 3 years. It takes long-term development.

Senator SESSIONS. Justice O'Connor, I am of the view that the Court needs to maintain its independence, its detachment from politics as much as it possibly can, and to the extent that the Justices are concerned that cameras might erode that even a little bit and create more of a political spin on the careful legal work they do, I support you, I support the Court in not having cameras in the courtroom live and would just say fundamentally I think it is a decision left to the judicial branch, not the legislative branch.

I remember being in the chair one day, Mr. Chairman, when Robert Byrd spoke. He would come down on Friday around 11 o'clock and make speeches pretty often, and that was my time to preside. He made a speech about textbooks, and he discussed democracy and a republic and the differences between the two and how the textbooks had not properly delineated the difference. And his closing line was it was "touchy-feely twaddle in our textbooks."

So to the extent which you are working to help our young people understand this magnificent legal system that we have, I thank you very much.

Pursue this a little further. To me, the most pernicious thing that could be taught to young people is that the courts are not independent adjudicators of discrete legal problems, but that they are somehow a part of the political process and their rulings are based on political stresses and pressures and views of Justices, and that this could erode the kind of respect Americans should give to the courts. Is that a concern for you?

Justice O'CONNOR. Very much so. I agree with you completely, and it is best to maintain the independence of the judicial branch. That is what the Framers designed. It has worked quite well at the Federal level, and we need to try to maintain it at the State level as well.

I happen to think that holding judicial elections in States is not the best way to go, that that lets too much poitical influence in through campaign contributions. That is dangerous. We do not need to do that.

Senator SESSIONS. I can see that concern. I am not sure I share it, but I certainly understand it.

Justice O'CONNOR. Yes, yes.

Senator SESSIONS. And I think it is a valid concern.

Justice O'CONNOR Yes.

Senator SESSIONS. The Constitution contemplates that the courts would be independent adjudicators. I was pleased when Justice Roberts referred to it as an independent—what did he say?—a "neutral empire."

Justice O'CONNOR. Yes.

Senator SESSIONS. Like in a ball game, the umpire does not take sides to advance one team or another, but does its best every day to call the balls and strikes.

Justice O'CONNOR. Yes.

Senator SESSIONS. I think that is an image or metaphor that is valid and that we should push.

Now, there are times when people on both sides think the Court does not do that.

Justice O'CONNOR. I am sure.

Senator SESSIONS. And they think that the Court is allowed personal and ideological and so forth views, political insights to impact their decisionmaking.

First, would you agree that Justices should seek to guard against that and to live within the oath, which is to be a judge under the Constitution and the laws of the United States?

Justice O'CONNOR. Of course I do, yes. I served on that Court for 25 years, and I entered it without a lot of inside knowledge but with respect for the structure the Framers developed. I left after 25 years with the knowledge and understanding that it works remarkably well along those lines. So I think we have been fortunate.

Senator SESSIONS. Well, I think that my personal view is that the greatest danger to the independence of the American judiciary would be a belief on the part of the American people that it is not adhering to that role but is using the power to interpret the words of statutes and the Constitution to advance an agenda, and that

would be a great tragedy if that were to happen and people were to lose confidence.

Justice O'CONNOR. Yes. I agree.

Senator SESSIONS. And with regard to criticizing the courts, I have tried to—I believe a Senator and an American citizen has a right to question the Court, but I believe we should do it respectfully.

Justice O'CONNOR. Yes.

Senator SESSIONS. And some of the criticism that I have seen from the Congress I think has been over the top. But I would say that, in my view, if a nominee comes before this Judiciary Committee for confirmation and they are not philosophically committed to the limited role of a judge or their record indicates that they are not, I cannot give them that lifetime appointment. So that is sort of my standard, within the range of disagreements over how to interpret law and Constitution. If you are outside that, then I think—then you are not under the Constitution—I should not give you a lifetime appointment.

I guess good people can disagree—Senator Leahy and I agree sometimes, sometimes we do not—about where that line should be drawn. But I do think Congress has a role to try to ensure that the judiciary remains a neutral umpire. Would you not agree?

Justice O'CONNOR. Yes. The Senate plays a very key role in the overall process in terms of agreeing at the outset who is going to be serving and who is not.

Senator SESSIONS. I would just conclude by saying how much I appreciate your interest in educating the next generation.

Justice O'CONNOR. Yes.

Senator SESSIONS. Because I have become convinced that we are not fully appreciative of the uniqueness of the wonderful legal system we have, how it is unlike almost any nation in the world. It has served us magnificently. It has created our growth, prosperity and freedom.

Justice O'CONNOR. Yes.

Senator SESSIONS. And if we get a misconception about how the legal system works, I think it could endanger it.

And, Mr. Chairman, thank you for having Justice O'Connor to share her thoughts with us.

Chairman LEAHY. Well, thank you, Senator Sessions. She is now the fourth Supreme Court Justice who has come before us as partly an educational thing. The iCivics, I like that very much.

Senator Sessions mentioned the views we hear in some other countries. It is kind of an eye opener. I recall when one nation that had been under a very totalitarian form of government moved toward democracy, and a group of their leaders came to see me, and they said: "Now, is it true that in your country sometimes people sue the Government?"

Justice O'CONNOR. I know.

Chairman LEAHY. I said, "Well, yes, it happens all the time."

Justice O'CONNOR. Right.

Chairman LEAHY. And he said, "But is it true that sometimes the Government loses?–" I said, "Often happens." And they said, "Well, then do you replace the judge?–" And when I explained, it was almost like, you know, in the cartoons where the light bulb goes on.

Justice O'CONNOR. Yes.

Chairman LEAHY. They realized that we really are different.

On the iCivics website that Senator Sessions and others have talked about, a majority of the Supreme Court Justices in the game "Supreme Decision" are women, which is——

Justice O'CONNOR. That is my fault.

[Laughter.]

Chairman LEAHY. Hey, listen, my wife's family came from Canada, and in Canada the majority of the Supreme Court are women, and the Chief Justice is.

Justice O'CONNOR. Well, the Chief Justice in Canada is a woman, and they have had historically more women on than we have. It was not a majority, but——

Chairman LEAHY. That is right. Now, to what extent do you think diversity on the Court or anywhere in the top of our branches increases public confidence?

Justice O'CONNOR. Oh, I think it does. I mean, our citizens like to look up at the U.S. Senate and see some diverse faces, skin color, et cetera, up there. And they like that at the judicial level, too, for courts of appeal that have multiple members. I think it gives the citizens some confidence.

Chairman LEAHY. In an interview with Nina Totenberg a few years ago, you noted that statutes and constitutions do not protect judicial independence, people do.

Justice O'CONNOR. Right.

Chairman LEAHY. What people are you referring to?

Justice O'CONNOR. Well, the judges, for one thing, and the voters who in the States put in a system that enables the citizens to have confidence in that system.

Chairman LEAHY. I described the system we have in Vermont where the Governor appoints the judges, the legislature votes consent. After a period of years, the legislature has a vote on retention.

Justice O'CONNOR. Yes.

Chairman LEAHY. 99 percent of the time they are retained.

Justice O'CONNOR. Yes.

Chairman LEAHY. What do you think of a system like that?

Justice O'CONNOR. Well, it is just one——

Chairman LEAHY. In other words, the legislature, not——

Justice O'CONNOR. It is one step removed from the public. I guess it can work. If the State is satisfied with it, fine. But you could set it up that way if you preferred, but I think most States that have retention elections refer the people to the voter.

Chairman LEAHY. Yes. But when it is referred to the voters, that would be the time when people would start having to raise money for campaigns, is it not?

Justice O'CONNOR. Well, normally it will not if it is just one name up for retention without being contested at some level. There would be no need for campaign money.

Chairman LEAHY. That is a good point.

A few years ago, you interviewed Justice John Paul Stevens, and this goes back to some of the questions on the confirmation. You said that—it came out in that interview that you both agreed on the fact that sometimes at a confirmation hearing, when you are

answering questions and issues come up and you may have a different view at the time the issue comes up.

Justice O'CONNOR. Yes.

Chairman LEAHY. Is that a fact?

Justice O'CONNOR. Yes, that is a fact.

Chairman LEAHY. And have you had that happen to you, without——

Justice O'CONNOR. Well, I do not remember specifically. Possibly. I do not remember.

Chairman LEAHY. Well, would you agree with me that it would be a mistake if in the confirmation process that we should be able to expect that we are going to get a very specific answer on how you are going to vote on a case 5 years from now?

Justice O'CONNOR. Yes, I think that is probably not a very good question to even ask a prospective Justice.

Chairman LEAHY. But is it valid to ask questions of one's judicial philosophy?

Justice O'CONNOR. Of course.

Chairman LEAHY. OK.

Justice O'CONNOR. Absolutely. Absolutely.

Chairman LEAHY. And their background?

Justice O'CONNOR. Absolutely.

Chairman LEAHY. OK. Senator Blumenthal, did you have anything further?

Senator BLUMENTHAL. No, Mr. Chairman.

Chairman LEAHY. Senator Sessions.

Senator SESSIONS. I do not.

Chairman LEAHY. Well, again, just for the two of you who came in after, again, would the students stand up, all the students who are here? I think this is great.

Justice O'CONNOR. That is good. Yes, you still have a lot who are listening. That is good.

[Laughter.]

Chairman LEAHY. Well, Justice O'Connor, I thank you very much. I thank all of you who are here. But, Justice O'Connor, I thank you very much for coming.

Justice O'CONNOR. Thank you, Senator Leahy, and thank you, Senators, for your interest and your presence. And if you have suggestions about iCivics or ways of telling people in your State to use it, if you are comfortable doing it, I hope you will because I think it will help us.

Chairman LEAHY. Well, I have some grandchildren who are going to get a chance to.

Justice O'CONNOR. Good. All right. I do, too.

Chairman LEAHY. Thank you. We stand in recess.

Justice O'CONNOR. OK. Thank you.

[Whereupon, at 11:24 a.m., the Committee was adjourned.]

[A Submission for the record follow.]

SUBMISSIONS FOR THE RECORD

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on "Ensuring Judicial Independence Through Civics Education"
July 25, 2012

I welcome Justice O'Connor back to the Senate Judiciary Committee. I am happy we are also joined by many students in this room and over the Internet who are interested in learning more about judicial independence.

I believe that discussions like this serve our democracy. As public officials, we owe it to all Americans to be transparent about what we do in our official capacities. We justify their trust by demonstrating how our Government works to uphold our common values, how we are guided by the Constitution, and how that Constitution has served over the years to make our great Nation more inclusive in our continuing effort to become that "more perfect union."

The design of our Federal Government, as set forth by our Constitution, provides for three branches of government, only two of which are political. The third branch, the judiciary, is independent of the two political branches by design. Both of the political branches come together in the judicial confirmation process to equip that independent branch with the men and women necessary to carry out its role in our democracy.

Judicial independence and the role of judges in our democracy has been the subject of two previous hearings with Supreme Court justices but in the wake of recent rhetoric about the sitting Chief Justice, this public conversation here today is all the more relevant. In the past few weeks, the Chief Justice has been labeled a "traitor" and his ruling in the health care decision has been called a "betrayal" to former President George W. Bush. These types of attacks reveal the misguided notion that justices and judges owe some allegiance to the president who appointed them or to a political party.

I have served on this Committee for more than three decades and have questioned every Supreme Court Justice serving on the high court today at their confirmation hearings. I have voted to confirm Justices and judges nominated by both Republican and Democratic presidents, and I have long noted that I do not vote to confirm individuals to the bench because I expect to agree with all of their decisions. My only standard is whether the nominee would be the kind of independent judge who would be fair and impartial.

No one should demand political allegiance from any judge. As many sitting justices have noted, it is completely appropriate to criticize the rulings of any court, including the Supreme Court. There is much in the Chief Justice's recent health care decision with which I disagree. For example, I find the opinion of Justice Ginsburg compelling on congressional authority under the Commerce Clause and Spending Clause. But it reveals a complete misunderstanding of our democracy to label the Chief Justice a "traitor" as if he owed partisan allegiance to a political party.

This is a teachable moment. And who better than Justice O'Connor to seize on that moment. Justice O'Connor has dedicated her life to public service. She has been elected to state

government and served on both the state bench and on the highest court in the land. She has traveled the world to teach emerging democracies about the importance of the rule of law. And most recently, she has directed her considerable talents to reminding us of the importance of civics education so that our own democracy will continue to thrive and be protected.

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